UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

JACKSON TERRACE ASSOCIATES
Employer[1]

and Case No. 29-RD-1037

DELANO THOMPSON, An Individual
Petitioner

and

NATIONAL ORGANIZATION OF INDUSTRIAL TRADE UNIONS (NOITU) and INDUSTRIAL PRODUCTION EMPLOYEES UNION, LOCAL 72, affiliated with NOITU
Intervenors[2]

DECISION AND DIRECTION OF ELECTION

Jackson Terrace Associates (the Employer) operates a residential apartment complex in Hempstead, New York. The Intervenors, National Organization of Industrial Trade Unions (NOITU) and Industrial Production Employees Union, Local 72, NOITU (Local 72) have represented a bargaining unit of building service employees at the Hempstead facility. The parties' previous collective bargaining agreement was a three-year contract, effective from January 1, 2002, through December 31, 2004 (the 2002 -

[1] The petition originally named "Jackson Terrace Associates of Long Island" as the Employer's name. In the parties' commerce stipulation, the name appears simply as "Jackson Terrace Associates" and is described as a partnership, although the name was not officially amended on the record. It is not clear from the record whether the Employer's full name includes some designation such as "L.P." for limited partnership. For purposes of this Decision, the Employer's name will be called Jackson Terrace Associates, but the name may have to be amended at future stages of this proceeding.

2004 agreement). Delano Thompson (Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act to decertify the Intervenors on January 18, 2005, at a time when, Thompson claims, there was no successor collective bargaining agreement. The Employer and the Intervenor contend that they signed a Memorandum of Agreement on December 31, 2004, extending and modifying the prior agreement for another three years (the 2005 - 2007 MOA), and that the MOA bars an election at this time. However, Thompson claims that the Employer and Intervenor fraudulently back-dated the MOA, in order to create a contract bar and defeat the decertification process. A hearing on this issue was held before Marcia Adams, a hearing officer of the National Labor Relations Board.

In support of its position on these issues, the Intervenor called two witnesses to testify: Peter Pacheco (former vice president and current president of Local 72) and Gerard Jones (president of NOITU). The Employer called Peter Florey to testify, who oversees property management at the Hempstead facility. The Petitioner called six employee-witnesses to testify: Delano Thompson (handyman), Mercedes Benitez (handyman), Miguel Angel Valle (porter), Ciro Romero (assistant superintendent), Gerard Mason (porter) and Clifford Hamilton (maintenance employee).

As discussed in more detail below, the evidence regarding the execution of the 2005 - 2007 MOA is extremely contradictory and unclear. Ultimately, I conclude that the Employer and Intervenor have not met their burden of proving that the MOA was

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[2] The above-named labor organizations intervened in this proceeding based on their status as the incumbent collective bargaining representative. It appears from the record that Local 72 and NOITU operate as joint representatives of the bargaining unit in question.

signed when they claim it was, and that the cloud of uncertainty surrounding the MOA's execution prevents it from barring an election at this time.

Facts

Background

NOITU has represented the building service employees employed by Jackson Terrace Associates since at least 1992.[3] There are approximately 15 employees in the bargaining unit.

Intervenor witness Peter Pacheco testified that NOITU and the Employer have had a series of collective bargaining agreements for 15 to 20 years. The parties' recent agreement was a three-year contract, effective from January 1, 2002 through December 31, 2004 (Intervenor Exhibit 2).[4] The 2002 - 2004 agreement was signed by Peter Florey (for the Employer), Helen Lasky (then-president of Local 72) and Gerard Jones (president of NOITU).

A petition for an election in this unit would have been timely if filed on or between October 3, 2004, and November 1, 2004. However, no petition was filed during that "open period."

Undisputed facts regarding recent negotiations

There seems to be no dispute that the parties first met on Tuesday, November 30, 2004, to begin negotiating a successor contract, and that there were at least two more

[3] I hereby take administrative notice of the Board's certification of NOITU on March 16, 1992. I also note that in 1999, the undersigned found the parties' 1998 - 2001 collective bargaining agreement to bar an election, and I dismissed two petitions pending at that time (Case No. 29-RD-921, petition filed by Mercedes Benitez, and Case No. 29-RC-9183, petition filed by Local 32B-32J, Service Employees International Union, AFL-CIO).

meetings in December 2004.[5] The meetings took place at the Employer's facility. A manager named Richard Smith attended for the Employer. Pacheco, who was then the vice president of Local 72, attended for the union. (Pacheco is now Local 72 president). A committee of three employees accompanied Pacheco -- acting shop steward Delano "Raheem" Thompson, Mercedes Benitez and Miguel Angel Valle -- to all the meetings.

There is no dispute that the parties discussed various topics, including wages, holidays, vacation, sick days, and a possible three-month extension of the contract pending further negotiations. However, the parties completely disagree as to what happened thereafter in late December (including even the date of their last meeting) and in January.

Peter Pacheco's version

According to Pacheco, the last meeting occurred on Thursday, December 30. Pacheco was on vacation at the time, but agreed to attend this meeting nevertheless.

Pacheco testified that the parties reached agreement on several topics, including holidays, vacation and duration of the contract. Pacheco recalled the Employer's negotiator, Richard Smith, specifically reviewing the list of agreed-upon items one by one, asking the negotiating committee: "Are you okay with holidays? Are you okay with the vacation schedule? Are you okay with the contract term [three years]?" According to Pacheco, employees on the committee answered affirmatively to each item. However, they could not reach agreement on wages and pension contributions. Pacheco claims that he and shop steward Thompson proposed sending the wage and pension

[4] References to exhibits in the record are hereinafter abbreviated as follows: "Int. Ex. #" refers to Intervenor exhibit numbers, "Er. Ex. #" refers to Employer exhibit numbers, and "Pet. Ex. #" refers to Petitioner exhibit numbers.

issues to interest arbitration, and that the Employer agreed. There is no dispute that the parties did not sign any document at that meeting.

Immediately after the negotiation session, Pacheco and the negotiating committee went to talk to other employees in the lunchroom. Pacheco testified that he told employees that a contract was reached on all issues except wages and pension, and that those two issues would be sent to interest arbitration.

Pacheco claims that, later the same day -- Thursday, December 30 -- he called the Local 72 office and spoke to a clerical employee named Janet (last name not specified on the record). He told Janet the terms of the agreement, so that she could type up a document. Pacheco was not in the office when Janet typed the agreement, but Pacheco testified that she has worked for Local 72 for 15 years, and she knows how to insert provisions into their standard language. Pacheco's instructions were to get the agreement signed by the presidents of the two unions, and send it to the Employer by fax or overnight mail. Pacheco returned to his vacation.

At the hearing, Pacheco identified the signatures on the 2005 - 2007 MOA: then-president of Local 72, Helen Lasky, and NOITU president Gerard Jones. (The MOA, Intervenor's Exhibit 1, is attached hereto as Appendix A.) Pacheco was not present when they signed the contract, but he has worked with Lasky and Jones for many years, and testified that he recognized their signatures. No documentary evidence, such as an overnight mail receipt, was submitted to verify that the Intervenor indeed sent the contract to the Employer by the next day (Friday, December 31).

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[5] All references to December hereinafter are in 2004. All references to January are in 2005.

Pacheco testified that he first saw the MOA when he returned from vacation in early January. It was dated "12/31/04", and included the Employer's signature as well. He admits that he did not send a copy to Thompson or the other negotiating committee members at that time, or at any other time.

The MOA itself is a two-page document, extending the parties' prior agreement to December 31, 2007, and modifying certain provisions. Pacheco admitted that two of the modifications (substituting the American Arbitration Association for the New York State Employment Relations Board as a place to mediate or arbitrate grievances, and substituting the name Eugene Coughlin for the named arbitrator in Section XIX) had never been discussed at the negotiating sessions. He did not explain how agreement on those items came about, if not during the negotiation sessions. Pacheco also admitted that the MOA did not include the parties' alleged agreement regarding vacation time, due to an "oversight" on his part. The last item of the MOA indicates that the parties agree to submit the wage and pension issues to interest arbitration before arbitrator Roger Maher.

On Wednesday, January 5, Pacheco sent a letter to arbitrator Maher, requesting a hearing date for interest arbitration (Int. Ex. 3).

The next week, on Tuesday, January 11, arbitrator Maher sent a notice to the parties, setting the hearing date for January 24 (Er. Ex. 1). The fax notation on top of the page seems to indicate that Maher faxed the letter on January 12. The Intervenor did not send a copy of this notice to the negotiating committee. Pacheco claimed that he told Thompson verbally about the interest arbitration date, but he could not remember exactly when.

As noted above, the decertification petition in this case was filed on Tuesday, January 18. Pacheco testified that he did not know such a petition was going to be filed.

The next day, on Wednesday, January 19, the Intervenor notified negotiating committee members that the interest arbitration was scheduled to take place on January 24. Specifically, Helen Lasky faxed a letter (Int. Ex. 4) to the Employer's office, addressed to Thompson, indicating that copies were also sent to the other committee members, Benitez and Valle.

Pacheco testified that the interest arbitration hearing never took place on January 24, because Thompson left a voice mail message stating that the employees were "not going to show up." On January 27, the arbitrator sent a notice rescheduling the hearing to March 17 (Int. Ex. 5). This notice was not sent to the negotiating committee members. It is unknown whether the interest arbitration took place in March, after the hearing in the instant case.

Gerard Jones' version

Gerard Jones, who has been the president of NOITU for eight years, did not participate in the contract negotiations. He testified that he signed the MOA "towards the end of the year," although he could not remember the exact date. Specifically, Jones testified that Janet presented him with a document, and said that Pacheco needed him to sign it. Jones testified that he signed it, and he verified his signature on the MOA. He also testified that Helen Lasky was in his office at that time, that he saw Helen Lasky sign the MOA with his own eyes, and that he also recognizes her signature there. They did not date the document when they signed it. Neither the Employer's signature nor the date appeared on the document at that time. Jones testified that he instructed Janet to

send the MOA to the Employer. Jones did not know specifically how she sent it, e.g., by regular mail or Federal Express.

Peter Florey's version

Peter Florey, who oversees the Employer's property management but who did not participate in the contract negotiations, testified that he signed the 2005 - 2007 MOA on Friday, December 31. He did not indicate how the document was sent to his office, such as by regular mail or overnight mail. In any event, when he received the document from Richard Smith (the Employer's negotiator), it already had the two union signatures. Florey identified his own signature on the MOA, and also testified that he wrote "12/31/04" on the date line. Florey said that he gave it to his secretary after signing it.

Version of Delano Thompson and other employee-witnesses

Delano "Raheem" Thompson has worked for the Employer as a handyman since 1994, and was the acting shop steward. Thompson and other employee-witnesses dispute almost every point of Pacheco's testimony, as described above.

First, all three employee-members of the negotiating committee (Thompson, Mercedes Benitez and Miguel Angel Valle) dispute the date of the last meeting. They insisted that the meeting occurred on Wednesday, December 29, rather than on Thursday, December 30 as Pacheco testified.

Thompson, Benitez and Valle further testified that they were never asked by Smith or anyone whether they agreed to the holidays, sick days and other proposals. They testified that, in fact, no overall agreement was ever reached, and that they still considered all the issues to be open. Thompson stated that Pacheco's testimony about

reaching an agreement was a "blatant lie," and that no one ever mentioned interest arbitration.

Thompson testified that, during the last meeting, Pacheco handed Smith a three-month extension and asked if Smith would sign it. Smith responded that he himself did not have authority to sign the extension, but that he would get it signed and sent to Pacheco's office by the end of that day. According to Thompson, the parties also agreed to seek mediation[6] to help them resolve their differences. Pacheco ended the meeting by saying the parties would get a three-month extension, and then pursue mediation after he returned from vacation in January.

Thompson further testified that, when meeting in the lunchroom immediately after the negotiation session, Pacheco told employees not to worry, that he would get a three-month extension, and that the parties would go to mediation when he returned from vacation. Five other witnesses (committee members Benitez and Valle, plus employees Ciro Romero, Gerard Mason and Clifford Hamilton) all testified that Pacheco said he would get the three-month extension, and that the parties would continue to deal with the open issues thereafter. The employee-witnesses testified consistently that Pacheco did not say any agreement had been reached, and did not mention interest arbitration. However, the employee-witnesses did not corroborate Thompson's testimony that Pacheco mentioned mediation.

Thompson further testified that, during the week of January 3, he repeatedly asked Pacheco to fax a copy of the contract extension, but that Pacheco never did.

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[6] Thompson testified that he first brought up the possibility of mediation in a private conversation with Pacheco. Then when Pacheco proposed it at the last meeting, the Employer agreed. At the hearing, Thompson insisted that the parties discussed only *mediation*, not interest arbitration, explaining that he did not even know what interest arbitration was at that time, and that he never would have agreed to it.

According to Thompson, Pacheco never mentioned a memorandum of agreement being reached, or any interest arbitration during those telephone conversations. Thompson never received a copy of any MOA (Int. Ex. 1), or any documents regarding the interest arbitration (Int.
Ex. 3, Er. Ex. 1) during the first two weeks of January. According to Thompson, he did not hear anything about interest arbitration until shortly after he filed the decertification petition on Monday, January 18.

There was additional testimony regarding Thompson's subsequent conversations and correspondence with the Intervenor, the Intervenor's January 19 letter informing Thompson of the interest arbitration, and the cancellation of the January 24 interest arbitration date, but such testimony will not be detailed here. For present purposes, the only relevant question is whether the MOA was signed before the petition was filed.

Additional evidence from the exhibits

Helen Lasky no longer works for Local 72, and did not testify in the instant proceeding. As described above, Pacheco and Jones both testified that they recognized her signature on the MOA, and Jones also testified that he saw Lasky sign it on December 30. However, it should be noted that the signature on the MOA looks different from Lasky's signature on other documents, such as Int. Ex. 1 and Int. Ex. 4. (The signature page from Int. Ex. 1 is attached hereto as Appendix B and Int. Exh. 4 is attached as Appendix C.) For example, Lasky's signature on the MOA is more slanted and more "swirly" than Lasky's signature on Appendix Band C. Whereas the final "y" in Lasky in both Appendix B and C appears as fairly straight, vertical lines, the final "y" in her name on the MOA has a large "tail" swirling all the way across to the left under the

"L." In addition, Lasky's signature on the MOA also has an indecipherable scribble next to it, which Lasky's signature does not have in either Appendix B or C.

It should also be noted that Pacheco's bargaining notes, which were ultimately introduced into evidence as Petitioner Exhibit 5, show inconsistencies with his own testimony. At the bottom of a page labeled 12-23-04, under a column labeled "company offers," Pacheco wrote "12-28-04 Offer's aribition [sic]" in a different color ink. Moreover, there was no testimony by Pacheco -- or anyone else -- that the parties ever met on Tuesday, December 28. Furthermore, there was no testimony that the *Employer* offered interest arbitration. Pacheco testified that he and Thompson first raised the possibility of interest arbitration at the last meeting. Thus, the reference to arbitration in Pacheco's bargaining notes, appears to be a botched attempt to insert a mention of interest arbitration into his notes after the fact. Finally, Pacheco's alleged notes for the last meeting (labeled as 12/30) do not reflect his testimony. Most notably, there is no mention of interest arbitration whatsoever.

Discussion

In establishing the contract bar doctrine, the Board has attempted to strike a balance between preserving employees' right to freely choose their representative, and preserving some stability in the parties' collective bargaining relationship. This doctrine provides that when the contracting parties have executed a collective-bargaining agreement, they are entitled to a reasonable period of stability in their relationship without interruption. General Cable Corp., 139 NLRB 1123 (1962).

Employees who are covered by an existing contract of up to three years duration, but who wish to change or eliminate their bargaining representative, must wait until the

specified "open period" to file their petition. Specifically, the petition must be filed between 60 and 90 days before the expiration date of the contract. Leonard Wholesale Meats, 136 NLRB 1000 (1962). If no such petition is filed during that period, an incumbent union and employer have a 60-day "insulated period" during which they may try to negotiate and execute a new contract, without the disrupting effect of rival petitions or decertification petitions. Any petitions filed within the insulated period are dismissed. Employees who do not file their petition within the earlier "open" period take the risk that the incumbent union and employer may execute another contract during the insulated period, creating another bar for up to three years. However, if the incumbent union and employer have *not* signed a contract by the time the prior contract expires, then employees are free to file a petition during that interim as well (i.e., after the old contract expires but before a new contract is executed). Deluxe Metal Furniture, 121 NLRB 995, 1000 (1958). Thus, although the insulated period gives an incumbent union some time to negotiate a new contract undisturbed, it is limited to the specified 60-day period. The insulated period does not indefinitely postpone the employees' rights to change representative.

There is no question in the instant case that the Petitioner did not file the petition during the open period, between October 3 and November 1, 2004. There also can be no dispute that, as a legal matter, a contract such as the 2005 - 2007 MOA containing substantial terms and conditions, including an agreement to send certain economic terms to interest arbitration, can bar an election. *See* Stur-Dee Health Products, Inc., 248 NLRB 1100 (1980). Thus, if the MOA in the instant case were executed before the petition was filed, it would bar an election. The real question in this case is a factual one,

that is, whether the MOA was actually executed before the decertification petition was filed on January 18.

The party or parties asserting that a contract bars an election bear the burden of proving that the contract was fully executed, signed and dated before the petition was filed. Roosevelt Memorial Park, Inc., 187 NLRB 517 (1970).

The Board has consistently held that vague or inconsistent evidence regarding the timing of a contract's execution does not satisfy the burden of proof. For example, in Bo-Low Lamp Corp., 111 NLRB 505 (1955), when a rival union filed a petition on August 6, the employer and intervenor union produced a recognition agreement dated August 5. One of the intervenor's signatories (secretary) testified that he signed the agreement in the early afternoon of August 5, although he admitted that he neither mentioned the signing, nor showed a copy of the contract, to employees at a meeting later that same afternoon. Two employees likewise testified that, during the late-afternoon meeting, the union secretary did not say he had entered into an agreement with the employer. There was no evidence in the record as to when the other union signatory (president) signed the alleged agreement. Finally, the employer signatory was initially uncertain as to the date of signing, although he ultimately "resolved" his uncertainty by stating that it was August 5. Under those circumstances, the Board found that the intervenor did not sustain its burden of proving that the agreement was actually signed before August 6.

Similarly, in Roosevelt Memorial Park, *supra*, when a rival union filed a petition in April 1970, the employer and incumbent union produced an undated document, which they claimed to have executed back in December 1969. The three intervenor signatories

testified variously that they signed the agreement "this past winter," or "around the 15th of December" or that they "could not give any date." The employer's signatory testified that he signed "in the early part of December." However, the employer's signatory also admitted that he had said on another occasion that dues were not remitted to the intervenor before April 1970 because there was no contract. Furthermore, a petitioner witness who previously worked as a field representative for the intervenor, testified that he never saw a copy of the contract before April. The Board found this testimony "vague" and "inconsistent," and therefore insufficient to meet the burden of proving that the contract was actually signed in December.

Finally, in Lane Construction Corp., 222 NLRB 1224 (1976), the employer and some local union officers signed a contract in July and August, 1975, respectively. However, under the intervenor's constitution, the contract would not be binding until the international union's officers signed it. Further complications ensued during the fall, including a dispute with the international union and a strike, while the employees started to sign cards for a rival union. Suddenly, on November 11, the intervenor sent a telegram to the employer stating that "at the present time" the intervenor had "a valid contract," although it did not (at that time) send a copy of a contract signed by the international officers. The rival union filed a petition on November 13. Four days later, on November 17, the employer finally received a copy of the contract signed by the international officers. Although the signature page stated that the parties affixed their signatures "this 28th day of July, 1975," there was no indication in the contract itself, or elsewhere in the record, of when the international officers actually signed the contract. The Board

concluded that this evidence, even including the November 11 telegram, was insufficient to prove that the contract was fully executed before the petition was filed.[7]

In the instant case, I find the evidence regarding the execution of the 2005 - 2007 MOA too uncertain to warrant denying the employees' right to vote at this time. The inconsistencies between Pacheco's testimony, the documentary evidence and the employee-witnesses testimony, and the many unanswered questions, make it impossible to determine when the document was actually signed. For example, if the Intervenor and Employer really agreed to interest arbitration during their last meeting, why didn't Pacheco's bargaining notes reflect that fact? Why do Pacheco's bargaining notes allegedly show that the Employer had offered arbitration on December 28, even though his own testimony contradicts this, and even though the parties did not even meet on that date? Why didn't the Employer's sole negotiator, Richard Smith, testify in this proceeding? Why did all the three employees on the bargaining committee testify that no agreement was reached at the last meeting? Why did a total of six employee-witnesses testify that Pacheco did not tell them about any agreement at the meeting afterward, except maybe an agreement to extend the contract for an additional three months? Why does the agreement drafted by Pacheco include items that were never discussed at the bargaining table, and omit one of the important items allegedly agreed on (vacation)? Was Pacheco's secretary really capable of drafting an agreement based on his one phone call, that it could be presented immediately for Jones and Lasky's signature with no opportunity for anyone's review or revision? Why does Helen Lasky's signature look so

[7] The cases cited above clearly show that, if there is dispute regarding the execution date of a contract, evidence must be taken on that issue, and the parties asserting contract bar bear the burden of proving that the contract was executed before the petition was filed. I reject the Employer and Intervenor's

different on the MOA than it does elsewhere? Why didn't she testify at the hearing regarding her alleged execution of the contract on December 30? Why didn't Gerard Jones remember when he signed it? If the Intervenors were so rushed to draft and sign an agreement on December 30 (the same day as the last meeting), why is there no evidence that they sent it by overnight mail, to corroborate that the Employer actually received it by the next day? Furthermore, if the parties really signed a contract by December 31, why didn't Pacheco ever send a copy of it to Thompson in early January? Finally, why weren't the committee members, who attended all the negotiation sessions, told about the interest arbitration until after the petition was filed?

These doubts about whether the MOA was fully executed on December 31, of course, do not *necessarily* mean that it was executed after the petition was filed on January 18. Theoretically, the MOA could have been signed in early January, before the petition was filed. (The letters regarding the interest arbitration, Int. Ex. 3 and Er. Ex. 1, would arguably support such a possibility.) But the evidence does not show that. Instead, the evidence purports to prove a December 31 signing date, and it fails to do. In particular, the Intervenor's evidence contains so many internal inconsistencies and improbabilities, and is so thoroughly contradicted by the employee-witnesses' testimony, that it not only fails to establish a December 31 execution, but also makes it impossible to determine exactly when the MOA was executed. The record simply leaves too much uncertainty in this regard. I therefore conclude that the Intervenor and Employer have failed to meet their burden under Roosevelt Memorial of proving that the 2005 - 2007 MOA was executed before the instant decertification was filed.

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assertions during the hearing and in their post-hearing briefs that the Board may consider only what is in

It is worth remembering that contract bar is a discretionary doctrine, which the Board may waive or impose as necessary, to reach the proper balance between employees' rights and labor stability. Carpenters Local 1545 v. Vincent, 286 F.2d 127, 131 (2nd Cir. 1960); NLRB v. Arthur Sarnow Candy Co., 40 F.3d 552 (2nd Cir. 1994). The Board does not take the disenfranchisement of employees lightly, and will not allow such disenfranchisement unless the parties asserting contract bar have properly met their burden. In this case, I conclude that the evidence regarding the MOA execution leaves too much uncertainty to allow it to postpone, for another three years, employees' statutory right to freely chose or reject their representative.

CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding, including the parties' stipulations and in accordance with the discussion above, I conclude and find as follow:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that Jackson Terrace Associates is a domestic corporation, with its principal office and place of business located at 100 Terrace Avenue, Hempstead, New York, where it is engaged in operating an apartment complex. During the past year, which period is representative of its annual operations generally, the Employer derived gross revenues in excess of $500,00, and purchased and received at its Hempstead, New York facility, goods and supplies valued in excess of $5,000 directly from suppliers located outside the State of New York.

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the "four corners" of the document.

Based on the parties' stipulation, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I hereby find, that both NOITU and Local 72 are labor organizations within the meaning of Section 2(5) of the Act. Together, they claim to represent certain employees of the Employer.

4. As discussed above, I have found that the 2005 -2007 MOA does not bar an election under these circumstances. Therefore, a question affecting commerce exists concerning the representation of certain employees of the Employer, within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[8]

> All employees, including production, maintenance, shipping and receiving, plant clerical employees and truck drivers, employed by the Employer at its 100 Terrace Avenue, Hempstead, New York facility, but excluding office clerical employees, foremen, watchmen, guards and supervisors as defined in the National Labor Relations Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have

[8] The bargaining unit is based on the unit description appearing in the parties' 2002 - 2004 contract (Int. Ex. 2). The wording of the exclusions has been changed slightly, without changing the meaning.

not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by the National Organization of Industrial Trade Unions (NOITU) and Industrial Production Employees Union, Local 72, NOITU (Local 72).

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before **March 31, 2005**. No extension of time to file the list may be granted, nor shall the filing of a request for

review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by April 7, 2005.

Dated: March 24, 2005.

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Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201